



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 20

**Evidence of Criminal Convictions
in Civil Proceedings**

WORKING PAPER

SEPTEMBER 1971

INTRODUCTION

The Law Reform Committee has been asked to review the law relating to evidence of criminal convictions in civil proceedings.

The Committee has now completed its first consideration of the matter and issues this working paper. The paper does not necessarily represent the final views of the Committee.

Comments and criticisms are invited. The Committee requests that they be submitted by the 12th of November 1971.

Copies of the paper are being forwarded to -

The Chief Justice and Judges of the Supreme Court

The Judges of the District Court

The Law Society

The Magistrates Institute

The Law School

The Solicitor General

The Crown Law Department

The Commissioner of Police

Other Law Reform Commissions and Committees with which this Committee is in correspondence.

The research material on which this paper is based is at the offices of the Committee and will be made available on request.

TERMS OF REFERENCE

1. "To consider the law relating to evidence of criminal convictions in civil proceedings and to report on the need, if any, for changes in the law."
2. The working paper is confined to a study known as the rule in *Hollington v Hewthorn* and, except incidentally, does not deal with the law relating to admissibility of evidence of criminal convictions for the purpose of attacking the credit of a witness or of a party, or of providing evidence of character or reputation.

PRESENT LAW

3. It seems generally accepted (but see paragraphs 7 and 11 below) that, subject to any statutory exception, evidence that a person has been convicted on a charge arising out of the same incident as that on which the civil claim is based is not admissible as evidence that he was guilty of the conduct constituting the offence with which he was charged.
4. That there is such a rule was confirmed in *Hollington v F. Hewthorn & Co. Ltd. and Another* [1943] 1 K.B. 587, a decision of the English Court of Appeal. The case arose out of a collision between two cars in which the plaintiff's car was damaged. The drivers of the cars were the only eye-witnesses of the accident. The driver of the defendant's car was convicted in the magistrate's court for the offence of driving without due care and attention (cf. s. 31B of the Western Australian *Traffic Act*). The conduct constituting this offence also constitutes the tort of negligence actionable at the suit of another who sustained damage as a result of the careless driving. The plaintiff brought a civil action in negligence against the convicted driver and his employer, but before it came on for hearing the driver of the plaintiff's car died. The plaintiff, deprived of his only witness, sought to put in evidence the conviction of the defendant driver as evidence of his negligence. The court held that the conviction was not admissible in the civil action and, the defendant calling no evidence, the plaintiff's action failed for want of any admissible evidence of the defendant driver's negligence.

The plaintiff (relying on s.1(3) of the *Evidence Act 1938* (U.K.)) also attempted to put in evidence a signed statement of the driver (who had died) as to the cause of the collision. The statement had been made to a constable soon after the accident. It was held that the statement was not admissible as it had been made at a time when the deceased must have anticipated the

likelihood of at least civil proceedings. Such a statement would now be admissible in Western Australian courts under s.79C of the *Evidence Act* (see paragraph 15 below). It would also now be admissible in England under s.2 of the *Civil Evidence Act 1968* (U.K.).

5. The rule (now commonly referred to as the rule in *Hollington v Hewthorn*) is of general application. Thus it applies to actions for defamation. The publisher of a statement that a person has committed an offence cannot adduce evidence of the conviction as evidence of the fact that the person convicted committed the offence (*Goody v Odhams Press Ltd.* [1967] 1 Q.B. 333).

6. Evidence of the conviction was, however, held to be admissible as evidence of the convicted person's bad reputation for the purpose of mitigating damages (*Goody v Odhams Press*). The rule was also avoided in *Re Crippen* [1911] P.108, where the court admitted Crippen's conviction for murder as evidence that he had murdered his wife. It refused to grant administration of the wife's estate to Crippen's legal personal representative. This aspect of the *Crippen* decision was criticised by the court in *Hollington v Hewthorn*.

7. The New Zealand Court of Appeal in *Jorgensen News Media (Auckland) Ltd.* [1969] N.Z.L.R. 961 declined to follow *Hollington v Hewthorn*. Jorgensen, who had been convicted of murder, claimed damages for libel in respect of a statement published by the defendant to the effect that he had killed the person of whose murder he had been convicted. The court held that a certificate of Jorgensen's conviction was admissible evidence of the fact the crime charged against him.

8. There are no reported decision on the High Court of Australia directly on the question.

9. In *R. v Seery* (1914) 19 C.L.R. 15, Griffith C.J., at p.16, reviewed the question of the reception of prior verdicts thus -

"There are ...serious difficulties as to the question whether a verdict in a criminal case either of guilty or not guilty is admissible under any circumstances as evidence in a civil case, and, if so, for what purpose. According to the older authorities it was never admissible. It may be that for some purposes it is admissible. But, if it is, it can only

be admitted as *res judicata*, and only when it appears that the point determined by the verdict is the same point which is in issue in the civil case. "

The court was directly concerned only with the narrower question whether there was a claim by the Crown for money had and received against its former servant who had been acquitted of a fraud charge in respect of the same money. The court held that the matter was not *res judicata* since fraud was not in issue in the civil case. In *Helton v Allen* (1940) 63 C.L.R. 691, the High Court held that evidence of an acquittal was not admissible as evidence that the person acquitted did not do the act constituting the offence.

10. A majority of the Full Court of the Supreme Court of Queensland in *Origliasso v Vitale* [1952] St. R.Q. 211 held that evidence of a conviction for assault was not admissible in evidence against the defendant in an action for damages for the same assault.

11. The views of Griffith C.J. in *R. v Seery* seem to be obiter, and since the actual facts before the court in *Helton v Allen* concerned an acquittal, not a conviction, it could possibly be argued that the question has not been authoritatively decided for Australian courts.

12. The Committee has not made an independent study of the attitude of the courts in jurisdictions other than the above. Cowen & Carter *Essays on the Law of Evidence*, Ch. VI, p.192-197 state that the courts of the United States and Canada have not followed a clear line. Wright in a note in 21 Can.B.R. 653 has stated that *Hollington v Hewthorn* overruled at least three cases (*Re Grippen* [1911] P.108; *Partington v Partington* [1925] P.34, and *O'Toole v O'Toole* (1926) 42 T.L.R. 245) which had been followed in Canada.

STATUTORY REVERSAL OR MODIFICATION OF THE RULE

Australia

13. There are two Commonwealth enactments which abrogate the rule in specific areas -

Section 101 of the *Matrimonial Causes Act 1959* provides that evidence that a party to a marriage has been convicted of a crime is evidence that the party did the act or thing constituting the crime. Thus evidence of a conviction for rape, sodomy or bestiality could be

used to support a petition for divorce based on the claim that the respondent had committed any of those offences.

Under s.98 of the *Trade Practices Act 1965* in proceedings for the enforcement of an order of the Trade Practices Tribunal and in an action for damages against a person acting contrary to an order of the Tribunal, a determination or order of the Tribunal out of which the proceedings arose is evidence of the facts stated in the determination or order to have been found by the Tribunal. (Although the determination or order is not of a criminal nature the same principle would appear to be involved).

14. In South Australia, s.34a of the *Evidence Act 1929-1960* (inserted in 1945) provides that where a person has been convicted of an offence, and the commission of that offence is in issue or relevant to any issue in a civil proceeding, the conviction is evidence of the commission of that offence admissible against the person convicted or those who claim through or under him. A conviction other than upon an information in the Supreme Court is not admissible unless it appears to the court that the admission is in the interests of justice.

The operation of the section is not limited to convictions by South Australian courts (*Hartley v Hartley* [1948] S.A.S.R. 39).

15. Each of the Australian States has also enacted provisions following those enacted in the English *Evidence Act* of 1938. In 1967 the Western Australian Parliament amended the Evidence Act to introduce s.79C. This makes admissible, subject to certain conditions, any statement made by a person in a document, if the maker had personal knowledge of the matters dealt with in the statement, or if he made the statement in the performance of a duty to record information supplied by persons who could reasonably be supposed to have personal knowledge of the matters dealt with. Under this provision the statement made by the deceased driver of the plaintiff's vehicle in the circumstances of *Hollington v Hewthorn* would have been admissible (see paragraph 4 above). The transcript of the evidence given at the criminal proceedings would also have been admissible. Such evidence now being admissible, there is less need to make the actual conviction itself admissible. However, the statements made admissible under s.79C do not have the effect given to evidence of the conviction in England - the effect of reversing the onus of proof (see paragraph 17 below).

United Kingdom

16. Following the recommendations of the English Law Reform Committee, which reported in 1967 (Fifteenth Report, Cmnd. 3391), the United Kingdom Parliament abrogated the rule by enacting ss.11 and 13 of the *Civil Evidence Act 1968*.

17. Under s.11(1) of that Act the fact that a person has been convicted of an offence by a United Kingdom court or court martial is admissible in civil proceedings for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence. This applies even though he was convicted on a plea of guilty and whether or not he is a party to the civil proceedings.

Section 11(2) provides that where a person is proved to have been convicted of an offence he is taken to have committed that offence unless the contrary is proved. For the purpose of identifying the facts on which the conviction is based, the contents of the complaint, indictment or other document are admissible in evidence.

18. Section 13 makes a previous conviction **conclusive** evidence in a defamation action that the person convicted committed the offence.

DISCUSSION AND PROVISIONAL VIEWS

19. The rule in *Hollington v Hewthorn* has been almost universally criticised by commentators. Apart from the report of the English Law Reform Committee (Cmnd. 3391) which led to the statutory reversal of the rule in England (see paragraph 16 above) it has been criticised by Cown & Carter *Essays on the Law of Evidence*, Ch. VI; Wright 21 Can.B.R. 653; *Wigmore on Evidence*, 3rd ed., Vol. V, p.687; and *Cross on Evidence*, Aus. ed., 1970, Ch.16, p.454. The New Zealand Court of Appeal has also criticised and declined to follow it (*Jorgensen v News Media (Auckland) Ltd.* [1969] N.Z.L.R. 961 (see paragraph 7 above)).

The rule has been defended by Hinton 27 Illinois L.R. 195 (see paragraph 24 below).

20. The main ground on which the Court of Appeal in *Hollington v Hewthorn* based its decision was that the conviction was merely proof that another court considered the defendant

guilty of careless driving and, just as the opinion of a bystander who had a full view of the accident is not relevant, so on a trial of the issues in a civil court the opinion of the criminal court is equally irrelevant.

21. This view of the relevance of a conviction was criticised by the English Law Reform Committee, at paragraph 3 of its report (Cmnd. 3391), thus -

"Rationalise it how one will, the decision...offends one's sense of justice. The defendant driver had been found guilty of careless driving by a court of competent jurisdiction. The onus of proof of culpability in criminal cases is higher than in civil; the degree of carelessness required to sustain a conviction for careless driving is, if anything, greater than that required to sustain a civil cause of action in negligence. Yet the fact that the defendant driver had been convicted of careless driving at the time and place of the accident was held not to amount even to *prima facie* evidence of his negligent driving at that time and place. It is not easy to escape the implication in the rule in *Hollington v Hewthorn* that, in the estimation of lawyers, a conviction by a criminal court is as likely to be wrong as right. It is not, of course, spelt out in those terms in the judgment of the Court of Appeal, although, insofar as their decision was based mainly upon the ground that the opinion of the criminal court as to the defendant driver's guilt was as irrelevant as that of a bystander who witnessed the accident, the gap between the implicit and the explicit was a narrow one."

22. The Committee went on, at paragraph 8 -

"We approach the rule in *Hollington v Hewthorn* from the premise stated in our *Report on Hearsay Evidence* (Thirteenth Report of the Law Reform Committee: Cmnd. 2964), that any material which has probative value upon any question in issue in a civil action should be admissible in evidence unless there are good reasons for excluding it. Our further premise is that any decision of an English Court upon an issue which it has a duty to determine is more likely than not to have been reached according to law and to be right rather than wrong. It may therefore constitute material of some probative value if the selfsame issue arises in subsequent legal proceedings.

23. However, the Court of Appeal in *Hollington v Hewthorn* was concerned to stress the difficulty of assessing the weight to be given the conviction. Goddard L.J., who delivered the judgment of the court, said, at page 594 -

"The court which has to try the claim for damages knows nothing of the evidence that was before the criminal court. It cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision. ...it is obvious that once the defendant challenges the propriety of the conviction the court, on the subsequent trial, would have to retry the criminal case to find out what weight ought to be attached to the result."

24. E.W. Hinton in 27 Illinois L.R. 195, defending the judgment in *Hollington v Hewthorn*, forcefully put the same point thus -

"Manifestly there is no way in a given case of determining the probative value of a conviction to establish the truth of the propositions on which it was based. If there were no other evidence we might indulge in a presumption and so settle the matter. But if there is other evidence on the questions what effect should be given to the fact that another jury on an unknown state of the evidence arrived at a given conclusion? The present jury, if it really considers the matter, must either blindly accept the conclusion of the first jury or ignore it because there is no rational alternative."

25. Turner J. in *Jorgensen v News Media (Auckland) Ltd.* (see paragraph 7 above) seems to have had similar misgivings, though not enough to decide against admissibility. Along the same lines is the statement of Buckley L.J. in *Stuppel v Royal Insurance Co. Ltd.* [1971] 1 Q.B. 50, at page 76, a case decided after the coming into force of s.11 of the *Civil Evidence Act 1968* (U.K.), that he could not discover any measure of the weight which the unexplored fact of the conviction should carry. Lord Denning M.R., on the other hand, in the same case considered that the conviction was "a weighty piece of evidence of itself" (at page 72). In the absence of an overriding majority view, Stirling J. in *Wright v Wright* (*The Times*, Feb. 15, 1971) followed Buckley L.J.

26. We are of the view that the difficulty of the weight to be attached to the conviction in any particular case is a real one and admits of no easy answer. A possible solution may lie in

admitting the conviction as evidence that the defendant committed the offence but only if no acceptable evidence to the contrary has been adduced. In this way the difficulty will be largely avoided, while in the appropriate case (such as *Hollington v Hewthorn*) the admission in evidence of the conviction would at least serve the purpose of putting the defendant at his peril if he declined to give evidence. The mere admission in evidence, under s.79C of the Western Australian *Evidence Act*, of the transcript of the evidence given in the criminal proceedings might not suffice to discharge the burden of proof on the plaintiff.

Practical consequence of reversal

27. The abolition or modification of the rule would be of little consequence in many cases since the issues in the civil proceedings would not be the same as those in the criminal proceedings. This was admitted by the English Law Reform Committee which said -

"The commonest type of case in which there is a criminal conviction for conduct which also constitutes a civil wrong is the running-down action. In the majority of defended running-down actions contributory negligence is pleaded and the degree of fault (if any) of all parties is in issue. This is not in issue in criminal proceedings and, even though the onus of proof of one party's negligence is shifted, it will generally be necessary on the issue of contributory negligence to call in the civil proceedings the same witnesses who gave evidence in the criminal proceedings. In cases of this kind the abolition of the rule in *Hollington v Hewthorn* is unlikely to result in much saving of time or expense." (Fifteenth Report, Cmnd. 3391, paragraph 23).

North P. in *Jorgensen v News Media (Auckland) Ltd.* took the same view by pointing out that a breach of traffic regulations was often of little assistance in determining the real cause of an accident.

28. On the other hand, the Committee emphasised that the abolition of the rule -

"...will avoid such injustice as occurred in *Hollington v Hewthorn* itself, where an essential witness died before the hearing, and may discourage denials of liability where no contributory negligence can be alleged." (paragraph 23).

The Committee also drew attention to divorce petitions based on the respondent's commission of a certain offence (already provided for in Australia - see paragraph 13 above), probate and administration actions involving cases of homicide, and defamation proceedings (in respect of which the Committee made special recommendations - see paragraph 30 below), where the issues are identical.

29. The reversal of the rule in England appears to have helped the person pleading the conviction in a number of cases - see *Wauchope v Mordecai* [1970] 1 W.L.R. 317 (the plaintiff was knocked off his bicycle by the defendant opening his car door on to the road. The defendant was convicted of a breach of the *Motor Vehicle Regulations*) and *Stupple v Royal Insurance Co. Ltd.* [1971] 1 Q.B. 50 (an action for conversion based on a conviction for robbery). It is difficult to assess what the real effect of admitting the convictions in these cases was, since the transcripts of the criminal proceedings were also admitted under s.2 of the *Civil Evidence Act 1968* (U.K.) and appear also to have influenced the court.

The reversal of the rule appears also to have been of advantage in *Taylor v Taylor* [1970] 1 W.L.R. 1148 where the respondent's conviction for incest was admitted as evidence to support the wife's divorce petition. Such a case is already covered by statutory provisions in Australia (see paragraph 13 above).

Defamation proceedings

30. Following the English Committee's recommendations the United Kingdom Parliament has provided that a conviction is conclusive evidence in defamation actions (see paragraph 18 above). The Committee argued that it was against public policy for libel actions to be commenced by persons determined to obtain a retrial of criminal proceedings (Report, paragraphs 26 to 33). There had been a number of such libel actions in England - see for example, *Hinds v Sparks* (*The Times*, June 27 and July 29, 1964) and *Goody v Odhams Press Ltd.* [1967] 1 Q.B. 333.

31. Although we do not know of any reported case in Australia of such a defamation proceeding we suggest that a similar provision could be adopted here. The New South Wales Law Reform Commission in its report on defamation (L.R.C.11) has recommended a similar change (see paragraph 60 of that report).

32. The English Committee also recommended that proof that a person had been acquitted of an offence should, in defamation proceedings, be conclusive evidence of his innocence.

33. This recommendation was not accepted by the United Kingdom Government. It is arguable that the grounds for treating an acquittal as conclusive evidence in defamation proceedings are weaker.

Identification of issues

34. The English Law Reform Committee thought that the judgment in *Hollington v Hewthorn* had overstressed the practical difficulties of identifying the conduct which is the subject matter of a conviction. However, to overcome these difficulties, such as they are, the Committee recommended that the actual indictment or information should be admissible for that purpose. Section 11 of the United Kingdom *Civil Evidence Act 1968* follows this recommendation and, should it be decided to admit convictions as evidence, either *simpliciter* or only in certain circumstances (see suggestion in paragraph 26 above), the enactment of a similar provision would be of advantage.

Pleas of guilty, summary convictions and third parties

35. Section 11 of the United Kingdom *Civil Evidence Act 1968* is drawn widely to make admissible -

- (a) a conviction based on a plea of guilty;
- (b) a summary conviction;
- (c) a conviction of a person other than a party.

Section 34a of the South Australian *Evidence Act*, summarised in paragraph 14 above excludes (c), and excludes (b) unless the court decides otherwise.

A plea of guilty by a person is now admissible as an admission against interest, but only against that person. It may seem unfair to permit a conviction to be admitted in proceedings against a third party since he would not have had an opportunity to be heard in the criminal proceedings. On the other hand, if the English Law Reform Committee's basic premise is

correct - that the conviction is evidence of high probative value that the person did in fact commit the offence - it should perhaps be admissible in such cases.

36. It is also suggested that, if the rule is reversed or modified, it should not be confined to convictions by Western Australian courts, but should extend at least to convictions by courts in other Australian States. Perhaps the law could go further and include convictions of courts in certain other countries, such as the United Kingdom.

Questions to be decided

37. The Committee would welcome comments on all or any of the following questions or on any aspects of the matter.

(a) Should the rule in *Hollington v Hewthorn* be abolished? It has strongly been contended that s.79C of the *Evidence Act* of this State, introduced in 1967, makes it unnecessary to go further, since it makes admissible statements made out of court, including statements made in previous proceedings (see paragraph 15 above).

(b) If so -

(1) Should a conviction be admitted as proof that the defendant committed the offence "until the contrary be proved" (as in s.11(2) of the United Kingdom Act - see paragraph 17 above) i.e. should it serve to discharge the plaintiff's burden of proof and cast the burden of proof of the particular facts on the defendant, or should it serve as proof only if no acceptable evidence to the contrary is adduced?

(2) In defamation proceedings should -

(i) a conviction be conclusive evidence of its correctness, as is the law in England,

(ii) an acquittal be conclusive evidence that the person did not commit the offence (as recommended by the English Law Reform Committee)?

- (3) Should -
 - (i) a conviction on a plea of guilty,
 - (ii) a summary conviction,
be admissible, and if so with what limitations?
- (4) Should a conviction be admissible as against third parties?
- (5) Should the indictment or information be admissible to identify the facts on which the conviction was based?